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## Protected tenancies: history and proposals for reform

by Edwina Schneller

### 1. Introduction

In November 2012 the Fair Trading Minister Anthony Roberts released an issues paper, [Making NSW Number 1 Again: Reducing Regulatory Burden](#) (the "2012 Issues Paper").<sup>1</sup> That paper proposes to repeal six pieces of legislation in the portfolio of Fair Trading, including the [Landlord and Tenant \(Amendment\) Act 1948 No.25](#) (the *LTA Act*). The closing date for submissions to NSW Fair Trading was 1 February 2013.<sup>2</sup>

The *LTA Act* provides greater security of tenure to tenants who live in "prescribed premises,"<sup>3</sup> sometimes colloquially referred to as 'controlled premises' or 'rent control.' There are restricted grounds for eviction and rent increases have to be agreed upon or the landlord has to go to the Fair Rents Board.<sup>4</sup> The tenants covered by the *LTA Act* are often referred to as 'protected tenants.' However, strictly speaking the *LTA Act* does not apply to a person but rather to property, described as "prescribed premises."<sup>5</sup>

Protected tenancies are specifically excluded from the *Residential Tenancies Act 2010*<sup>6</sup> which means that the Consumer Trader and Tenancies Tribunal (CTTT) cannot make orders in relation to such tenancies.

This e-brief provides a history of rent control in NSW including an overview of the key government inquiries held into the *LTA Act*. Discussed is the contentious issue of the number of protected tenants potentially remaining in NSW. This issue is considered by many as a compass to the most appropriate reform options. Key stakeholder submissions and options for reform are presented together with an overview of rent control in other Australian jurisdictions.

### 2. History of Rent Control in NSW<sup>7</sup>

#### 2.1 Pre-World War II

A limited form of rent control first commenced in Australia in NSW on 1 January 1916 with the introduction of the *Fair Rents*

*Act 1915*.<sup>8</sup> This Act was the result of a 1911 inquiry into high residential rents.<sup>9</sup>

During the 1920s various amendments were made including the extension of the fair rent legislation to shop premises.<sup>10</sup> In 1927 rent control became a major election issue and as a result of a change in government, the *Fair Rents (Amendment) Bill* was introduced, the passing of which in 1928 automatically led to the cessation of the *Fair Rents Act 1915*.<sup>11</sup>

However, as a result of the Great Depression control measures were re-introduced in the form of the *Reduction of Rent Act 1931*, which resulted in a reduction of the then current rents by 22.5%. In addition, the *Ejectments Postponement Act 1931* was introduced to place restrictions on evictions.<sup>12</sup>

Subsequently the *Landlord and Tenants (Amendment) Act 1932* was introduced which dealt with both evictions and reduction of rents. This Act repealed and replaced the *Ejectments Postponement Act 1931*. The Act also restricted the application of the *Reduction of Rent Act 1931* to leases of greater than three years (very few such leases existed). These specific provisions continued until 31 December 1947,<sup>13</sup> with the result that, for practical purposes, no form of rent control operated in NSW at the start of the Second World War.<sup>14</sup>

### 2.2 Second World War and after

At the start of World War II (3 September 1939) it was agreed at a Premiers Conference (9 September 1939) that measures should be taken to prevent "profiteering in essential commodities,"<sup>15</sup> including rent. This initiative needs to be considered in light of the fact that, in 1939, 50% of Australians were residential tenants of private landlords.<sup>16</sup> On 27 September 1939 the Commonwealth, under its "defence" head of power and further to the *National Security Act 1939*, introduced the *National Security (Fair Rents) Regulations (S.R. 1939, No. 104)*. Under the regulations the States had executive power to freeze rents at 31 August 1939 levels, as well as the power to establish Fair Rents Boards.<sup>17</sup>

Owing to concerns as to the validity of the Commonwealth regulations, NSW introduced its own legislation, the *Fair Rents Act 1939*.

As a result of a change of government, the Commonwealth regulations were repealed on 20 November 1941 and replaced by the *National Security (Landlord and Tenant) Regulations (S.R. 1941, 275)*. These provisions did not expressly impose controls on any State or Territory. Rather, if the Minister was satisfied that legislation in any particular State or Territory did not carry out the objects of the regulation, the Minister could make an order to apply the whole of the Commonwealth regulations to that State or Territory. This is what occurred in NSW with the Commonwealth Minister imposing orders between 28 November 1941 and 9 June 1944 to alter the *Fair Rents Act 1939*. The final order resulted in an inconsistency between the State *Fair Rent Act 1939* and the Commonwealth regulations, rendering the State legislation inoperative.<sup>18</sup>

The *National Security Act 1939* lapsed at the end of 1946. However, rent control continued under the *Defence (Transitional Provisions) Act 1946* until 16 August 1948, until which time the Commonwealth regulations had the

effect of stabilising rents. The Commonwealth legislative scheme ended due to a successful constitutional challenge<sup>19</sup> and an unsuccessful constitutional referendum in May 1948, which would have provided the Commonwealth with power over rents and other price control measures during peacetime.<sup>20</sup>

### 3. Legislative history of the LTA Act 1948

**Introduction:** With the cessation of the *National Security (Landlord and Tenant) Regulations* on 16 August 1948, the *LTA Act* had the objective of continuing rent control in the NSW. Specifically, the *LTA Act* was introduced to provide security of tenure to all tenants after World War II and not just for returned servicemen and their families.

The Minister for Conservation in his Second Reading Speech said "Unless the State intervenes... chaos will result."<sup>21</sup> The 1948 Act was deemed necessary owing to the insufficient supply of accommodation, following the Great Depression and two World Wars. The Minister stated:

Unless a degree of control is continued, there would be wholesale eviction of householders, with attendant misery and wholesale eviction of office users and of tenants in all classes of premises. In the result, rents would spiral, and apart from the serious consequences to the individual, passing on of increased rent charges in industry and commerce would have a serious damaging effect upon the price structure generally.<sup>22</sup>

Placing the legislation in context, according to the 1947 Census 47.4%<sup>23</sup> of Australians were tenants and in NSW this increased to 51.9%.<sup>24</sup> This differs to the current residential picture where 68.1%<sup>25</sup> of Australians and 67% of NSW residents<sup>26</sup> own their own home outright or with a mortgage.

**Amendments:** Since 1948, various State governments seeking to curtail rent control for one reason or another have introduced 45 amending bills. This has resulted in the Act developing a reputation of being so complex that was described by Helen Nelson as "one of the most technically incomprehensible pieces of legislation ever enacted in NSW"<sup>27</sup> and "a maze in which even lawyers hesitate."<sup>28</sup> Nelson provides a detailed analysis of the political climate and the electoral considerations that led successive NSW governments to amend the Act during between 1948 and 1976.<sup>29</sup>

When the *LTA Act* first commenced it applied to all premises except the Crown or the Housing Commission of NSW.<sup>30</sup> In addition it did not apply to land used or ordinarily used as a:

Grazing area, farm, orchard, market garden, dairy farm, poultry farm, pig farm or bee farm; holiday premises as defined under the Act and premises excluded by the Governor.<sup>31</sup>

The key amendments set out below all aimed to curtail the coverage of the Act:<sup>32</sup>

Year	Amendment
1954	All new buildings constructed on or after 16 December 1954 were exempted from the Act.
1956	Premises could be decontrolled when vacated and a lease known as a '5A lease' registered at the office of the Fair Rent Board.

It was thought that this amendment would ensure that no new protected tenancies would be created. However, up to 1986 many 'protected tenancies' were created, out of ignorance or neglect, as tenants moved into pre-1954 properties and their 5A lease was not registered, creating a new 'protected tenancy'.<sup>33</sup>

- |      |   |
|------|---|
| 1964 | Rents could be fixed by agreements known as 17A agreements. These were negotiated between landlords and tenants and did not require hearings by the Fair Rents Board.   |
| 1968 | Significant amendments were introduced including:<br>The Act was repealed for all non-residential premises;<br>The Act would only apply to buildings that had been converted to units before 1 January 1969;<br>Fair rent was no longer calculated according to a 1939 method and once a 17A agreement had been registered that would become the fair rent ongoing;<br>Wealthy tenant provisions were introduced imposing on certain tenants rents comparable to prevailing market rent; a tenant could be evicted if the landlord could show that the tenant could afford alternative accommodation. |
| 1985 | No new protected tenancies could be created from 1 January 1986 with the only exception of 'inheritance' under s 83A of the Act.  |

#### 4. Key Government Inquiries

**1961 Royal Commission:** In 1961 a Royal Commission of inquiry was held into the operation of the *LTA Act*.<sup>34</sup> The Commission recommended:

- The continuation of rent control due to a shortage of accommodation for those in the lower income group and to prevent the charging of excessive rents.<sup>35</sup>
- Parties should be able to enter into agreements and controlled rents should be increased by 60%.<sup>36</sup>

Rent control was found unnecessary in respect of:

- Commercial premises.<sup>37</sup>
- Controlled premises where the rent was not less than £5 per week. Rent control was found to be benefiting 'affluent tenants' who had no need for it.<sup>38</sup>

While none of these recommendations were acted upon immediately, they appear to have influenced the amendments made in 1968.

**1988 – Ministerial Inquiry:** In 1988 there was a *Ministerial Inquiry into Homelessness and the Provision of Affordable Accommodation into the Inner City of Sydney*.<sup>39</sup> The inquiry concluded:

Just as protected tenancies alleviate hardship for some tenants their continuance creates some degree of hardship for owners of protected properties. Unjust though it is for private owners to bear this burden by initially being required to subsidise these rents, there appears to be no other alternative at this stage, unless, of course, the Government were to make appropriate housing available to accommodate elderly protected tenants on low (statutory) incomes.<sup>40</sup>

**1989 - New South Wales Government Housing Committee Review:** The following year a Government Housing Committee review of the *LTA Act* was established. The Committee concluded that:

- The 1948 Act, particularly the fair rent provisions based on 1939 levels, is an anachronism.
- An accurate record of the total number of protected tenancies remaining in NSW needs to be obtained.
- A firm timetable for phasing out of the Act should be decided upon.
- The 1948 Act should be amended to overcome obvious anomalies.
- Proposals be considered to facilitate an orderly phasing out of the Act.<sup>41</sup>

This 'phase-out' was to be implemented by:

- An adequate proportion of Department of Housing allocations in each year being directed to protected tenants and that a policy of locating protected tenants as near as possible to their current home be instituted;
- Allowing for landlords as well as tenants of protected tenancies to apply to the Department of Housing for allocation of public housing to protected tenants;
- Allowing for, wherever possible, the Department of Housing to negotiate with landlords of protected premises to purchase the premises at a price midway between the value of the property with vacant possession and as a protected property (approximately 75% of actual value with vacant possession) thus freeing the property from the 1948 Act and at the same time increasing the stock of available public housing.<sup>42</sup>

The report concluded with recommendations divided into both "immediate" and "long term." The key "immediate" recommendation was that a register of protected tenants be established, with landlords and tenants given six months to lodge their details with the Office of the Rent Controller. In the "long-term" the Committee recommended that legislation be phased out over a five-year period, to be implemented by the Department of Housing engaging in a range of policies.<sup>43</sup>

A register of protected tenancies was established from October 1989 to June 1990. It had a low response rate, with only 570 tenants coming forward. None of the other recommendations were implemented.<sup>44</sup>

## 5. Overview of the LTA Act 1948

### 5.1 What are protected tenancies?

In determining whether a property is prescribed under the Act there are three key questions:

- A) When did the tenancy commence?
- B) Are the premises excluded or exempted?
- C) Have the premises been decontrolled?<sup>45</sup>



**Date of Tenancy:** A property will be protected if the lease (whether written or oral) commenced on or before 1 January 1986.<sup>46</sup>

**Are the Premises "Prescribed" and have they been excluded or exempted?** Section 8 of the LTA Act defines "prescribed premises" to refer to a "dwelling house" used as a residence. Hence, the only buildings that can be prescribed are: houses, residential units, sheds and garages. However, the building would have to have been built or under construction at least to the point of being inhabited<sup>47</sup> before 16 December 1954,<sup>48</sup> and if the building was subdivided into residential units, those units can only be prescribed if the subdivision took place before 1 January 1969.<sup>49</sup>

The Crown (including NSW Government agencies such as Roads and Maritime Services)<sup>50</sup> and the NSW Land and Housing Corporation are exempt from the *LTA Act 1948*.<sup>51</sup>

**Have the premises been decontrolled?** The registration of a lease known as a 5A lease could lead to decontrol. Amendments in 1968 resulted in two classes of 5A leases: those registered before 1 January 1969; and those registered from 1 January 1969. For the latter, to effectively decontrol premises the following conditions are required:

- vacant possession
- a current tenant received independent legal advice
- a registered lease at the office of the Fair Rent Board.<sup>52</sup>

## 5.2 Comparison with the Residential Tenancies Act 2010:

The Combined Pensioners and Superannuants Association (CPSA) in their [2011 Submission](#) (p: 11-12) provide a helpful comparison of how the *LTA Act* differs from the *Residential Tenancies Act*.<sup>53</sup> A summary of these differences is set out below:

Issue	Landlord and Tenant (Amendment) Act 1948	Residential Tenancies Act
<b>Rent</b>	<p>Required to pay 'fair rent' which may be set by:</p> <ul style="list-style-type: none"> <li>• A registered agreement between the landlord and tenant known as a 17A Agreement;</li> <li>• By a determination of the Fair Rents Board considering detailed factors prescribed in the <i>LTA Act</i>.<sup>54</sup></li> </ul> <p>Fair rent is based on the capital value of premises as of 31 August 1939 plus increases that have occurred through adjustments by 17A Agreements or determinations.</p> <p>The Fair Rents Board can set the rent based on "current value rental" in certain circumstances.<sup>55</sup></p>	<p>Market rent</p> <p>Rent increase if appropriate notice is given automatically applies after 60 days.<sup>56</sup></p> <p>Tenant may apply to the CTTT that rent is excessive.<sup>57</sup></p>
<b>Repairs</b>	<p>There is nothing in the <i>LTA Act</i> that requires a landlord to undertake repairs. For this reason many prescribed properties are in a derelict condition.</p> <p>Options that may result in repairs include:</p> <ul style="list-style-type: none"> <li>• As part of negotiations when entering a</li> </ul>	<p>Landlord required to maintain property as part of tenancy agreement.<sup>61</sup> A tenant can apply to the CTTT for an order for repairs.<sup>62</sup></p>

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	<p>new 17A Agreement;</p> <ul style="list-style-type: none"> <li>• Complaining that failure to repair is in interference with enjoyment of the premises.<sup>58</sup> However, this is rarely used according to the CPSA;<sup>59</sup></li> <li>• Complaining to the local council and seeking repairs.<sup>60</sup> However, there is a risk that an order could be made to demolish or to make such repairs that vacant possession would be required terminating the property's prescribed status.</li> </ul>	
<b>Termination/ Eviction</b>	<p>A protected tenancy cannot be terminated without grounds as provided by the <i>LTA Act</i>.<sup>63</sup></p> <p>The landlord must serve a 'notice to quit' with at least one ground. The ground must be established. However, even if the ground is established the court may dismiss because of hardship.<sup>64</sup></p> <p>A tenant may separately negotiate to surrender their tenancy on payment of compensation.<sup>65</sup></p>	<p>Under the <i>RTA</i> where a tenant has been in continual possession of residential premises for a period of 20 years or more, the landlord may apply to the CTTT for a termination order.<sup>66</sup></p> <p>No termination notice required</p> <p>No grounds required.<sup>67</sup></p>
<b>Inheritance</b>	<p>Upon death the tenancy may pass to either a spouse<sup>68</sup> or a child<sup>69</sup> (the latter needs to be in receipt of Centrelink payments) who resides at the prescribed premises. Such relatives are known as 'statutory tenants.'</p>	<p>Not applicable.</p>

### 6. Estimated Number of Protected Tenants in NSW

The 2012 Issues Paper states "it is unknown whether any protected tenancies still exist in NSW" and acknowledges that previous attempts to collect accurate data have "been time consuming and unsuccessful."<sup>70</sup> According to the Issues Paper, this has prevented contact with "affected parties,"<sup>71</sup> as a result of which the *LTA Act* has continued in force "even though it has become redundant and no longer serves the public interest."<sup>72</sup>

However, not everyone would agree with that conclusion. In particular, it does not reflect the position of key stakeholders, including, the Tenant's Union of NSW and the Combined Pensioners and Superannuants Association (CPSA), which supports the [Older Persons Tenants Service \(OPTS\)](#).

All parties agree that no one knows definitively how many protected tenancies continue to exist in NSW.<sup>73</sup> In 1960, there were 207,000 controlled dwellings in the State representing approximately two-thirds of all private rentals.<sup>74</sup> The 1961 Royal Commission confirmed this figure.<sup>75</sup> In 1974 a survey was conducted by the Rent Controller, which reported 20,000 tenancies remaining in NSW.<sup>76</sup>

The 1989 Government Housing Committee Review estimated that the *LTA Act* applied to an estimated 5,000 to 10,000 tenancies in the State.<sup>77</sup> The review did not specify how this figure was calculated but stated that: "guidance can be obtained from the declining statistics in protected tenancy related activities".<sup>78</sup>

The same review acknowledged that whilst the number may have been reduced by attrition, the fact is it could also have increased prior to the 31 December 1985 amendment.<sup>79</sup> It is this situation that distinguishes NSW from Victoria, where no new 'protected tenancies' could be created from 1 January 1956<sup>80</sup> and why it is argued that the number of such tenancies is greater in NSW.<sup>81</sup>

In 2012 the Real Estate Institute of NSW (REINSW) submitted that there is:

No merit in maintaining the current Act, or carrying forward these provisions in other legislation, unless the actual number of affected properties can actually be determined with certainty.<sup>82</sup>

In their submissions, both the Property Owners Association of NSW Inc (POA-NSW) and the CPSA proposed methods for determining the number of 'protected' tenancies, an analysis of which is beyond the scope of this paper. POA-NSW only proposed questions that could be used as a guide. Similarly, the CPSA also suggested a strategy for determining "Who are the remaining tenants?"<sup>83</sup> The CPSA estimated that there are an around 450 to 900 current 'protected tenancies',<sup>84</sup> an estimate which is also relied on by the Tenants Union of NSW.<sup>85</sup>

### 7. Stakeholder Views on Reforms

The 2012 Issues Paper proposes that the *LTA Act* be repealed, with transitional provisions granting a 12 month grace period to any remaining protected tenants to obtain alternative accommodation.<sup>86</sup> Alternatively, two other options are proposed for consideration:

(a) The Act could be streamlined to retain just the key protections against rent increases and termination, re-drafted in plain-English to simplify the legislation. ("Alternate Option A").

(b) The Act could be repealed and its key provisions placed in the mainstream tenancy laws, most likely in a self-contained schedule to effectively separate it from the general tenancy laws.<sup>87</sup> ("Alternate Option B").

NSW Fair Trading has said that "all submissions will be made publicly available in due course."<sup>88</sup> The Law Society of New South Wales has indicated that several of the Society's policy committees are reviewing the Issues Paper and that it is "quite likely that the property Law committee will make a submission."<sup>89</sup>

In the meantime, the Research Service has obtained copies of submissions from the following organisations:

- Property Owners Association of NSW Inc (POA-NSW);
- [The Real Estate Institute of New South Wales \(REINSW\)](#);
- Tenant's Union of New South Wales; and
- [Older Persons Tenant's Service \(OPTS\) a project administered by the Combined Pensioners and Superannuants Association of NSW \(CPSA\)](#).<sup>90</sup>

**POA-NSW:** The POA-NSW argued that "it is an anachronism that in 2011 we still have rent control properties. No one knows how many still exist." It



adds that "present-day real estate agents know nothing of protected tenants," and that protected tenant rental hearings are so rare that even the last rental advocate in Sydney for landlords passed away. The submission concludes by asserting that "rent control has led to the devastation of cities such as New York and Paris" and that it is a "retrograde policy which persists because of poor planning by governments lacking courage and vision."<sup>91</sup>

**REINSW:** The REINSW argued that the *LTA Act* should be "immediately repealed" because it:

- is out dated and uncompetitive;
- disadvantages landlords, as it prevents them from being able to use or deal with their properties; and
- adversely affects values of properties which are [the] subject of protected tenancies.<sup>92</sup>

The REINSW believes that any remaining protected tenants should be protected, and that this should be the responsibility of government, in particular Housing NSW. The REINSW is opposed to re-drafting the Act as it considers that the cost involved would "outweigh the costs of Government providing alternative accommodation and care for any remaining protected tenants."<sup>93</sup>

**Tenants Union of New South Wales:** The Tenants Union of New South Wales stated:

We do not think that the 1948 act is red tape... We have understood it to be the long-standing policy of successive governments that these arrangements, and the 1948 Act itself, should not be disturbed, and instead be left to end in their own time.<sup>94</sup>

The Tenants Union was of the view that re-drafting could result in litigation,<sup>95</sup> and argued that if the *LTA Act* is redrafted into 'plain English', either as part of a transfer to the *RTA* or as a stand-alone piece of legislation, there is:

a strong possibility that changes of substance may be made inadvertently- and a stronger possibility that there would be litigation to test the effect of the changes.<sup>96</sup>

In addition it was argued that "transferring the provisions of the 1948 Act to the *RTA* would create a greater regulatory burden than leaving the 1948 Act in its current form".<sup>97</sup> The Tenants Union warned that "many other amendments would have to be made to the rest of the *RTA* to ensure that the 1948 Act provisions are, in effect, sealed off."<sup>98</sup> The Tenants Union asserted that such an option "would increase the complexity of the *RTA*,"<sup>99</sup> as the majority of the public do not know about protected tenancies.

**Combined Pensioners and Superannuants Association (CPSA):** CPSA is of the view that:

Any repeal of the 1948 Act will severely compromise the protection currently afforded to the remaining protected tenants regardless of whether key provisions are transferred to general tenancy laws.<sup>100</sup>

The CPSA argued that if the *LTA Act* is repealed it is highly likely that prescribed premises will be sold. The CPSA said that the majority of 'protected tenants' are in receipt of the Age Pension and as such would be unlikely to be able to afford private rental in the areas they currently live. Tenants have lived in these areas for at least 27 years since before 1 January 1986, after which no new protected tenancies could be created.<sup>101</sup>

The CPSA questioned the ability of Housing NSW to re-house protected tenants, assuming eligibility within the proposed 12 month transitional period. The CPSA also raises the issue of the potential effect of relocating elderly tenants, relying on a Swedish study of 22,579 elderly persons which reported that elderly residents when forced to move often die within 12 months.<sup>102</sup>

As for the option of redrafting the legislation in plain English, the CPSA questioned the time and cost-effectiveness of this proposal given that "the objective is not to change the key protections... and given that the number of protected tenants in NSW is relatively small."<sup>103</sup> The CPSA argued that the *LTA Act* has "a rich, complicated and detailed history and tampering with it may well create new problems,"<sup>104</sup> and key protections "may be lost in translation" or compromised if incorporated into the *RTA*.<sup>105</sup> In addition, the CPSA questioned whether the *RTA* would become unwieldy.

The CPSA recommended that the:

The 1948 Act should be retained in its current form. However, should the 1948 Act be repealed we would recommend Option (b) where the 1948 Act is included as a self-contained schedule in the *Residential Tenancies Act* 2010.<sup>106</sup>

## 8. Rent Control in Other Jurisdictions in Australia

Western Australia was the first State to commence the process of decontrol in 1951, with decontrol occurring in 1954.<sup>107</sup> In Tasmania amendments were made to the *Landlord and Tenant Act 1935* in 1950 and at the end of 1955 the Act lapsed and was not renewed. Queensland abolished protected tenancies with no phase out period in 1970.<sup>108</sup>

South Australia commenced the process of decontrol in 1951 and control ended in 1962 when the *Landlord and Tenant (Control of Rents) Act 1942* was repealed by the *Excessive Rents Act 1962*. The latter Act allowed tenants to apply to a Local Court to determine whether rent was excessive. This Act was repealed by the *Residential Tenancies Act 1978*.<sup>109</sup>

While the law has been significantly altered in Victoria, a number of protected tenancies remain, as discussed below.

### 8.1 Victoria - *Landlord and Tenant Act 1958*

Victoria prevented new 'protected tenancies' being created from 1 January 1956.<sup>110</sup> This is in contrast to NSW where protected tenancies could no longer be created from 1 January 1986.<sup>111</sup> The [CPSA's submission](#) of 14 October 2011 provides a detailed comparison of how the Victorian Act differed from the *LTA Act*.

In 1956 it was estimated that there were approximately 180,000 'protected tenants' in Victoria. By 1971, this number had dropped to between 15,000 and 20,000.<sup>112</sup> In 1982, 726 protected premises had been nominated by landlords to a register. A review of this register in 1991 concluded that there were 220 controlled premises housing 265 tenants. In 1995, the Tenants Union of Victoria (TUV) estimated there were only 155 "protected premises" housing approximately 220 persons.<sup>113</sup> Consumer Affairs Victoria suggested that "natural attrition would result in very few protected tenancies remaining by the year 2000."<sup>114</sup>

In 2008, the Victorian Minister for Consumer Affairs asked Consumer Affairs Victoria to review the *Landlord and Tenant Act 1958* to determine whether the Act should be repealed or updated.<sup>115</sup> Similar to the current debate in NSW, a number of options were considered, including:

1. Repeal the Act and transfer the protected tenancy provisions to the Residential Tenancies Act.
2.
  - a. Repeal the Act, with head-leasing for protected tenants.
  - b. Repeal the Act, with the Residential Tenancy Fund or the Victorian Property Fund paying a subsidy to protected tenants.
3. Phase out protected tenancies and transfer provisions relating to agricultural tenancies to another act.<sup>116</sup>

In the event, Consumer Affairs Victoria recommended that the Act be repealed and any provisions relating to protected tenancies be "modernised and transferred to the Residential Tenancies Act 1997."<sup>117</sup> A perceived advantage was that the law relating to all residential tenancies would be expressed in plain English, and the remaining protected tenants would still be protected.

The *Landlord and Tenant Act 1958* was amended by repealing sections over a two year period, commencing in 2010, with the entire Act finally being repealed on 1 September 2012.<sup>118</sup> However, a 'savings provision' was inserted into the *Residential Tenancies Act 1997 (VIC)*, [Section 14](#) and [Clause 14](#) of Schedule 1. These provisions make it clear that the *Landlord and Tenant Act 1958* continues to apply to premises that were prescribed within the "meaning of Part V of the *Landlord and Tenant Act 1958* immediately before that Act was repealed." In addition, upon the death of a lessee of a "prescribed premise" the live-in partner of the lessee may take over the protected tenancy.<sup>119</sup> However, if this does not apply the death will automatically lead to the cessation of the *Landlord and Tenant Act 1958* applying to that property.<sup>120</sup>

### 9. Conclusion

A key question is whether the *LTA Act* is an anachronism or does it still have relevance? Any answer will depend in part on the number of current 'prescribed premises', to which there does not appear to be a clear answer at present. The 2012 Issues Paper suggests a number of alternative courses of action, none of which seem to have found complete acceptance among the major stakeholders. Perhaps that is not unexpected considering the diverging interests and perspectives at issue.

- <sup>1</sup> Anthony Roberts, Fair Trading Minister, Media Release, 18 November 2012.
- <sup>2</sup> The NSW Government as part of its ten-year strategic business plan, [New South Wales 2021](#) ("2021 Plan") has set a target to reduce red tape for businesses and the community by 20% by June 2015.
- <sup>3</sup> Section 8, *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>4</sup> Older Persons Tenants Service (OPTS) under the auspice of the Combined Pensioners & Superannuants Association of NSW Inc (CPSA), Submission to the Commissioner for Fair Trading, Proposed repeals of the Landlord and Tenant (Amendment) Act 1948 and the Landlord and Tenant Act 1899, (Sydney: 14 October 2011) at 11.
- <sup>5</sup> R, Wilkinson, "Guide to Protected Tenants in New South Wales", Combined Pensioners & Superannuants Association of NSW Inc. (3rd ed) (Sydney, 2002) at 5.
- <sup>6</sup> Section 7(a), *Residential Tenancies Act 2010* (NSW).
- <sup>7</sup> A detailed history of rent control may be found in the Report of the Royal Commission of Inquiry on the Landlord and Tenant (Amendment) Act 1948 as amended, October 1961 (VCN Blight, Government printer, Sydney, New south Wales, 1962); se also Robert Albon (ed) *Rent Control Cost & Consequences* (Sydney: Centre for Independent Studies, 1980) at 83-178.
- <sup>8</sup> H.V, Evatt, "A 'Fair Rent' Experiment in New South Wales in Robert Albon (ed) *Rent Control Cost & Consequences* (Sydney: Centre for Independent Studies, 1980) at 107-118.
- <sup>9</sup> Report of the Royal Commission of Inquiry on the Landlord and Tenant (Amendment) Act 1948 at 78.
- <sup>10</sup> *Fair Rents (Amendment) Act, 1926 (No.2)*.
- <sup>11</sup> Note 9 at 79.
- <sup>12</sup> Note 9 at 80.
- <sup>13</sup> Note 9 at 80.
- <sup>14</sup> Note 9 at 12.
- <sup>15</sup> NSWPD, 25 October 1939, p 6961(Second Reading Speech for the Fair Rents Bill).
- <sup>16</sup> Consumer Affairs Victoria, "Landlord and Tenant Act Options Paper: Modernising Victoria's Consumer Policy Framework", (Melbourne, October 2008) at 6.
- <sup>17</sup> Note 9 at 81.
- <sup>18</sup> Note 9 at 81.
- <sup>19</sup> *R.V. Commonwealth Rent Controller; ex parte National Mutual Life Association of Australia Ltd* (1947) 75 CLR 361.
- <sup>20</sup> R, Albon, "Australia: History and Overview" in Robert Albon (ed) *Rent Control Cost & Consequences* (Sydney: Centre for Independent Studies, 1980) at 93.
- <sup>21</sup> NSWPD, 27 July 1948, p3353.
- <sup>22</sup> NSWPD, 27 July 1948, p3354.
- <sup>23</sup> [1947 Census: Australia](#)
- <sup>24</sup> [1947 Census: NSW](#)
- <sup>25</sup> [2011 Australian Census, Quick Stats: Australia](#)
- <sup>26</sup> [2011 Australian Census, Quick Stats: New South Wales](#)
- <sup>27</sup> The Real Estate Institute of New South Wales (REINSW) [Submission RE: Reducing Regulator Burden](#) Issues Paper, 25 October 2011.
- <sup>28</sup> H, Nelson, "The Politics of Decontrol in New South Wales" in Robert Albon (ed) *Rent Control Cost & Consequences* ( Sydney: Centre for Independent Studies, 1980) at 150.
- <sup>29</sup> H, Nelson, "The Politics of Decontrol in New South Wales" at 139-156.
- <sup>30</sup> Section 5, *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>31</sup> Section 8 "prescribed premises" *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>32</sup> R, Wilkinson, "Guide to Protected Tenants in New South Wales", Combined Pensioners & Superannuants Association of NSW Inc. (3rd ed) (Sydney, 2002) at 2-3
- <sup>33</sup> NSW Government Housing Committee, *Review of the Landlord and Tenant (Amendment) Act 1948, Report to the Minister for Housing*, August 1989 at 4.
- <sup>34</sup> Note 9.
- <sup>35</sup> Note 9 at 67.
- <sup>36</sup> Note 9 at 67.
- <sup>37</sup> Note 9 at 68.
- <sup>38</sup> Note 9 at 67.
- <sup>39</sup> *Ministerial Inquiry into Homelessness and the Provision of Affordable Accommodation into the Inner City of Sydney*, Report of the Committee, (M.S Raine, S.E Ball, T.J. Wilton)(Sydney, 14 September 1988).
- <sup>40</sup> Note 40 at 8.

- <sup>41</sup> NSW Government Housing Committee, *Review of the Landlord and Tenant (Amendment) Act 1948, Report to the Minister for Housing*, August 1989 at 4.
- <sup>42</sup> *Ibid* at 34-35.
- <sup>43</sup> *Ibid* at 4.
- <sup>44</sup> R, Wilkinson, "Guide to Protected Tenants in New South Wales", Combined Pensioners & Superannuants Association of NSW Inc. (3rd ed) (Sydney, 2002) at 3.
- <sup>45</sup> R, Wilkinson, "Guide to Protected Tenants in New South Wales", Combined Pensioners & Superannuants Association of NSW Inc. (3rd ed) (Sydney, 2002) at 5.
- <sup>46</sup> Section 5AA *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>47</sup> The case *Hills v Cox* (RT 94/5510) interpreted the meaning of "erect" and concluded it meant a building 'set-up' on vacant land. (Rita p.9)
- <sup>48</sup> Section 5A(1)(a) *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>49</sup> Section 5AA *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>50</sup> *Interpretation Act 1987* – s13A.
- <sup>51</sup> Section 5 *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>52</sup> Section 5A (1)(e) *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>53</sup> [Residential Tenancies Act 2010 No 42](#).
- <sup>54</sup> Sections 21, 26B, 27 and 31MAA of the *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>55</sup> Division 4AA *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>56</sup> Section 41 and s 42 *Residential Tenancies Act 2010*.
- <sup>57</sup> Section 44 *Residential Tenancies Act 2010*
- <sup>58</sup> Section 81 (1) *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>59</sup> Personal communication with the author from R, Mowbray and A, Boulton of the Older Persons Tenants' Service (OPTS) under the auspice of the Combined Pensioners & Superannuants Association (CPSA) (10 January 2013).
- <sup>60</sup> Section 121B *Environmental Planning and Assessment Act 1979*
- <sup>61</sup> Section 63(1) *Residential Tenancies Act 2010*
- <sup>62</sup> Section 187 *Residential Tenancies Act 2010*
- <sup>63</sup> Section 62 *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>64</sup> Section 70(1) *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>65</sup> Section 36 (1) *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>66</sup> Section 94 *Residential Tenancies Act 2010*
- <sup>67</sup> Note 4 at 12.
- <sup>68</sup> Section 83A(1)(a) *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>69</sup> Section 83A(1)(b) *Landlord and Tenant (Amendment) Act 1948* (NSW).
- <sup>70</sup> Anthony Roberts, Fair Trading Minister, Media Release, 18 November 2012 at 12.
- <sup>71</sup> *Ibid* at 12.
- <sup>72</sup> *Ibid* at 12.
- <sup>73</sup> Property Owners Association of NSW Inc (POA-NSW), Submission: *Landlord and Tenant (Amendment) Act 1948 (NSW)* to the Office of Fair Trading, Ms. Virginia McKay, 20 October 2011. Provided to the author by John Gilmovich, President POA-NSW, 9 January 2013. The POA-NSW states "no-one knows how many exist" and Older Persons Tenants' Service, [Submission to the Commissioner for Fair Trading- Response to the Issues paper entitled 'Making NSW Number 1 Again: Reducing Regulatory Burden'](#),<sup>1</sup> February 2013 at 5.
- <sup>74</sup> Note 20 at 97.
- <sup>75</sup> Note 5 at 4.
- <sup>76</sup> Note 33 at 7.
- <sup>77</sup> Note 33 at 4.
- <sup>78</sup> Note 33 at 7- Such as various applications to the Fair Rents Board
- <sup>79</sup> Note 33 at 7.
- <sup>80</sup> *Landlord and Tenant (Amendment) Act 1956* and Note 4 at Appendix 1.
- <sup>81</sup> As noted, as a result of the 1989 Review, a register was established from October 1989 to June 1990; it had a low response rate and only 570 tenants came forward.
- <sup>82</sup> REINSW, Submission RE: Reducing Regulator Burden Issues Paper, 25 October 2012.
- <sup>83</sup> *Ibid* at 7.
- <sup>84</sup> Older Persons Tenants Service (OPTS) under the auspice of the Combined Pensioners & Superannuants Association of NSW Inc (CPSA), Submission to the Commissioner for Fair Trading, Response to Issues paper entitled 'making NSW Number 1 Again: Reducing Regulatory Burden,' (Sydney: 1 February 2013) at 7.
- <sup>85</sup> Tenants Union of New South Wales Submission: RE: *Landlord and Tenant Act 1899 (NSW) and Landlord and Tenant (Amendment) Act 1948 (NSW)* to the Fair Trading



Commissioner, NSW Fair Trading, 17 October 2011 at 2. Provided to the author by Dr. Chris Martin, Senior Policy Officer, 28 November 2012.

<sup>86</sup> Note 1 at 12.

<sup>87</sup> Note 1 at 12.

<sup>88</sup> Note 1 at 7.

<sup>89</sup> Information provided to the author by Gabrielle Lea, Policy Lawyer, Policy and Practice, The Law Society of New South Wales, 21 January 2013.

<sup>90</sup> More information on OPTS is provided [here](#).

<sup>91</sup> Property Owners Association of NSW Inc (POA-NSW), Submission: *Landlord and Tenant (Amendment) Act 1948 (NSW)* to the Office of Fair Trading, Ms. Virginia McKay, 20 October 2011. Provided to the author by John Gilmovich, President POA-NSW, 9 January 2013.

<sup>92</sup> Note 82.

<sup>93</sup> Note 82.

<sup>94</sup> Note 85 at 3.

<sup>95</sup> Note 85 at 3.

<sup>96</sup> Note 85 at 3.

<sup>97</sup> Note 85.

<sup>98</sup> Note 85 at 3.

<sup>99</sup> Note 85 at 3.

<sup>100</sup> Information provided to the author by R, Mowbray of the Older Persons Tenants Service (OPTS) under the auspice of the Combined Pensioners & Superannuants Association of NSW in an email dated 28 November 2012.

<sup>101</sup> Note 84 at 10.

<sup>102</sup> Danemark, Berth D, Ekstrom, Mats E, and Bodin, Lennart L 'Effects of residential relocation on mortality and morbidity among elderly people', *European Journal of Public Health*, Vol. 6 1996 No. 3, pp212-217.

<sup>103</sup> Note 82 at 11.

<sup>104</sup> Note 4 at 12.

<sup>105</sup> Note 82 at 12.

<sup>106</sup> Note 82 at 14.

<sup>107</sup> Note 20 at 94.

<sup>108</sup> Note 33 at 19.

<sup>109</sup> Note 20 at 95. But note that in South Australia the [Housing Improvement Act 1940](#) which is administered by the South Australia Housing Trust. The Trust is empowered to control the rent on any property that "is undesirable for human habitation or is unfit for human habitation:" Sections 25 and 49-61B of the [Home Improve Act 1940](#) (SA).

<sup>110</sup> *Landlord and Tenant (Amendment) Act 1956* and Note 4 at Appendix 1.

<sup>111</sup> Note 5 at 6.

<sup>112</sup> Note 16 at 6.

<sup>113</sup> Note 16 at 7.

<sup>114</sup> Note 16 at 9.

<sup>115</sup> Note 16 at 1.

<sup>116</sup> Note 16 at 18-20.

<sup>117</sup> Note 16 at 3.

<sup>118</sup> This Act was repealed on 1 September 2012 by section 236 of the *Australian Consumer Law and Fair Trading Act 2012* (VIC), No. 21/2012.

<sup>119</sup> Clause 14(1) of Schedule One, *Residential Tenancies Act 1997* (VIC).

<sup>120</sup> Clause 14(2) of Schedule One, *Residential Tenancies Act 1997* (VIC).

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